VICTORIA JAYASEELE MARTIN A

v.

MAJLIS AGAMA ISLAM WILAYAH PERSEKUTUAN & ANOR B

COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
ALIZATUL KHAIR OSMAN JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: W-01-242-2011] C
12 SEPTEMBER 2013
[2013] CLJ JT(6)

ISLAMIC LAW: *Syariah legal profession - Legal practice - Admission of Peguam Syarie - Powers of Majlis Agama Islam - Whether could only admit Muslims as Peguam Syarie - Administration of Islamic Law (Federal Territories) Act 1993, s. 59(1) & (2) - Peguam Syarie Rules 1993, r. 10* D

STATUTORY INTERPRETATION: *Construction of statutes - Administration of Islamic Law (Federal Territories) Act 1993, s. 59(1) & (2) - Powers of Majlis Agama Islam to admit Peguam Syarie - Power to admit "any person having sufficient knowledge of Islamic law as Peguam Syarie" in s. 59(1) - Whether subject to and curtailed by s. 59(2) of Act - Whether could only admit persons of the Islamic faith* E F

STATUTORY INTERPRETATION: *Construction of statutes - Parent and subsidiary legislation - Administration of Islamic Law (Federal Territories) Act 1993 - Peguam Syarie Rules 1993 - Inconsistency - Provision in Rules contrary to intent and purport of provision in parent Act - Whether Rules did not stand on equal footing with parent Act - Whether could not override parent Act - Whether provision in Rules ultra vires* G

WORDS & PHRASES: *"any person" - Section 59(1), Administration of Islamic Law (Federal Territories) Act 1993 - Natural meaning - Whether meaning "any Muslim" - Whether meaning any person regardless of his or her religion* H

The appellant, a non-Muslim advocate and solicitor, had applied to the Peguam Syarie Committee, a body established by the first respondent ('the Majlis') under the Peguam Syarie Rules 1993 ('the Rules'), for admission as a Peguam Syarie. The application, I

purportedly, was made pursuant to s. 59(1) of the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act') which provides that "Subject to sub-s. (2), the Majlis may admit any person having sufficient knowledge of Islamic law as Peguam Syarie". On 9 September 2009, the Committee, and hence the Majlis, refused to process the application on the ground that under r. 10 of the Rules, only Muslims could be admitted as Peguam Syarie. It was not in dispute that r. 10, which was enacted pursuant to the powers granted to the Majlis by s. 59(2) of the Act, provides that "A person may be admitted to be a Peguam Syarie if he is a Muslim ...". Be that as it may, the appellant subsequently moved the High Court to review and quash the decision of the Majlis, arguing that r. 10 is inconsistent with s. 59(1) and *ultra vires* the Act. The learned judge, having adverted to the provisions, took the view that the Majlis was empowered under s. 59(2) to make rules relating to qualification for admission of persons as Peguam Syarie, including the power to impose a condition such as housed in r. 10 (the applicant must be a Muslim), and in the circumstances, dismissed the judicial review application. The appellant appealed and reiterated the point that under the scheme of s. 59 of the Act, and r. 10 of the Rules, a person's faith or religion has never been a *sine qua non* for admission as a Peguam Syarie. The respondents retorted that it is a matter of basic pre-requisite that a Peguam Syarie should be a Muslim, as the Syariah Court has no jurisdiction over non-Muslims. They further argued that by virtue of the words "subject to sub-s. (2)" in s. 59(1), s. 59(1) is subservient to s. 59(2) as well as the rules made thereunder. Before the learned justices of appeal, the primary question that called for determination was whether, upon the proper constructions of s. 59(1) and (2) of the Act, and r. 10 of the Rules, the aforesaid impugned condition in r. 10 is *ultra vires* s. 59(1) of the Act.

Held (allowing appeal; declaring r. 10 *ultra vires* with no order as to costs)

Per Abu Samah Nordin JCA delivering the judgment of the court:

(1) Section 59(1) does not delimit the power of the Majlis to admit any person as a Peguam Syarie only to Muslims. In the absence of any definition, the words "any person" in s. 59(1), in their natural meaning, must mean any person regardless of

his religion. There is nothing in the Act to restrict the meaning of the words "any person" to mean "any Muslim". Thus, under s. 59(1), any person with sufficient knowledge of Islamic law may, at the discretion of the Majlis, be admitted as a Peguam Syarie. (para 14)

(2) Under s. 59(1), even being a Muslim *per se* is not sufficient to be admitted as a Peguam Syarie. He must be a Muslim with sufficient knowledge of Islamic law. It is not the function of the court to question why s. 59(1) was drafted as such. However, it is naïve to think that any non-Muslim is incapable of acquiring sufficient knowledge of Islamic law. It is common knowledge that Islamic law, as a subject of learning, is not the monopoly of Muslims. (para 14)

(3) The power of the Majlis to admit any person having sufficient knowledge of Islamic law as a Peguam Syarie is conferred by the parent Act itself. The rules made under s. 59(2), on the other hand, are a form of subsidiary legislation. As subsidiary legislation, the rules do not stand on equal footing as the parent Act and cannot override the parent Act. (para 15)

(4) The phrase "subject to subsection (2)" in s. 59(1) of the Act does not make s. 59(1) subservient to s. 59(2), as contended. This is because s. 59(2) itself does not take away or curtail the power of the Majlis to admit "any person having sufficient knowledge of Islamic law" as a Peguam Syarie. Section 59(2) is merely an enabling provision, which the legislature has conferred on the Majlis to make rules to regulate the procedure and qualification for admission of Peguam Syarie. The Majlis cannot, by way of subsidiary legislation, make rules inconsistent with or contrary to s. 59(1). Rule 10, which provides that a person may be admitted as a Peguam Syarie if he is a Muslim, is clearly contrary to s. 59(1) which does not limit the power of the Majlis to admit a person as a Peguam Syarie to Muslims only. It is *ultra vires* s. 59(1) of the 1993 Act. (para 16)

(5) The amendment to s. 59(1) by Act A931 did not alter the meaning of the words "any person" in s. 59(1) or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a Peguam Syarie. The amendment in fact widens the power of the Majlis to admit a Peguam Syarie. The word "persons" in the original s. 59(1) had been amended to "any person" in the new s. 59(1). In addition, a

A new sub-s. (3) was introduced to widen the power of the Majlis by allowing it to exempt any member of the Judicial and Legal Service or any person appointed under s. 3 of the Legal Aid Act 1971 from the provisions of s. 59. This means that this court's view that the words "any person" in s. 59(1) as
B including any person regardless of his religion is not contrary to the whole scheme of the Act. Simply put, the Act does not close the doors for non-Muslims having sufficient knowledge of Islamic law to appear in Syariah Court. (paras 17 & 20)

C

(6) The word "Muslim" has not been used consistently throughout the Act as a qualification on matters relating to appointment, admission and membership of a body, committee or council, or appointment of judges of the Syariah Court. In
D any case, if the intention of s. 59 is to admit only Muslims having sufficient knowledge of Islamic law as Peguam Syarie, it must say so in clear and unequivocal terms. The duty of the court is to expound the language of the Act in accordance with settled rules of construction. The court has nothing to
E do with the policy of any Act which it is called upon to interpret. (paras 21 & 22)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang peguambela dan peguamcara yang bukan beragama
F Islam, telah memohon kepada Jawatankuasa Peguam Syarie, sebuah badan yang ditubuhkan oleh responden pertama ('Majlis') di bawah Kaedah-Kaedah Peguam Syarie 1993 ('Kaedah'), untuk diterima masuk sebagai Peguam Syarie. Permohonan dibuat di bawah s. 59(1) Akta Pentadbiran Undang-Undang Islam (Wilayah-
G Wilayah Persekutuan) 1993 ('Akta') yang memperuntukkan bahawa "Tertakluk kepada sub-s. (2), Majlis boleh menerima masuk sesiapa yang mempunyai pengetahuan yang mencukupi berkenaan undang-undang Islam sebagai Peguam Syarie". Pada 9 September 2009, Jawatankuasa, dan Majlis, menolak untuk memproses permohonan
H tersebut atas alasan bahawa di bawah k. 10 Kaedah, hanya mereka yang beragama Islam boleh diterima masuk sebagai Peguam Syarie. Ia tidak dipertikaikan bahawa k. 10, yang telah digubal menurut kuasa yang diberikan kepada Majlis oleh s. 59(2) Akta, memperuntukkan bahawa "Seseorang itu boleh diterima masuk
I sebagai Peguam Syarie jika beragama Islam ..." Walau apa pun,

perayu seterusnya memohon ke Mahkamah Tinggi untuk menyemak semula dan membatalkan keputusan Majlis, dengan hujahan bahawa k. 10 adalah tidak selaras dengan s. 59(1) dan *ultra vires* Akta tersebut. Yang arif hakim, setelah merujuk kepada peruntukan, mengambil pandangan bahawa Majlis diberikan kuasa di bawah s. 59(2) untuk membuat peraturan-peraturan berhubungan kelayakan kemasukan seseorang sebagai Peguam Syarie, termasuk kuasa untuk mengenakan satu syarat seperti yang terdapat dalam k. 10 (pemohon mesti beragama Islam), dan dalam keadaan itu, telah menolak permohonan semakan kehakiman. Perayu merayu dan mengulangi hujahan bahawa di bawah s. 59 Akta, dan k. 10 Kaedah, kepercayaan atau agama seseorang tidak pernah menjadi satu *sine qua non* untuk kemasukan sebagai Peguam Syarie. Pihak responden membalas bahawa ia adalah satu perkara pra-asas bahawa Peguam Syarie harus beragama Islam, kerana Mahkamah Syariah tidak mempunyai bidang kuasa atas orang bukan Islam. Mereka juga berhujah bahawa berdasarkan perkataan "tertakluk kepada sub-s. (2)" di bawah s. 59(1), s. 59(1) adalah akur pada s. 59(2) serta peraturan-peraturan yang telah dibuat. Di hadapan yang arif hakim-hakim, soalan utama yang memerlukan penentuan adalah sama ada, berdasarkan pentafsiran betul s. 59(1) dan (2) Akta, serta k. 10 Kaedah, syarat yang dipersoalkan dalam k. 10 adalah *ultra vires* s. 59(1) Akta.

Diputuskan (membenarkan rayuan; mengisytiharkan k. 10 *ultra vires* tanpa perintah untuk kos)
Oleh Abu Samah Nordin HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 59(1) tidak membatasi kuasa Majlis untuk menerima masuk sesiapa sebagai Peguam Syarie hanya kepada mereka yang beragama Islam. Tanpa sebarang definisi, perkataan "any person" dalam s. 59(1), mengikut maksud biasa, mesti bermaksud sesiapa sahaja tanpa mengira agama. Tiada apa-apa dalam Akta yang menyekat makna perkataan "any person" untuk bermaksud "sesiapa yang beragama Islam". Oleh itu, di bawah s. 59(1), sesiapa yang mempunyai pengetahuan yang mencukupi berkenaan undang-undang Islam boleh, pada budibicara Majlis, diterima masuk sebagai Peguam Syarie.

(2) Di bawah s. 59(1), walaupun seseorang itu beragama Islam dengan sendirinya, adalah tidak memadai untuk diterima masuk sebagai Peguam Syarie. Seseorang itu harus beragama Islam dengan pengetahuan undang-undang Islam yang mencukupi. Ia

bukan fungsi mahkamah untuk mempersoalkan mengapa s. 59(1) telah dirangkakan sebegitu. Walau bagaimanapun, ia adalah naïf untuk berfikir bahawa seseorang yang bukan beragama Islam tidak berupaya untuk memperoleh pengetahuan yang mencukupi berkenaan undang-undang Islam. Ia adalah pengetahuan umum bahawa undang-undang Islam, sebagai satu subjek pembelajaran, bukan monopoli orang-orang Islam.

(3) Kuasa Majlis untuk menerima masuk seseorang yang mempunyai pengetahuan yang mencukupi berkenaan undang-undang Islam sebagai Peguam Syarie diberikan oleh Akta induknya. Peraturan-peraturan yang dibuat di bawah s. 59(2), walau bagaimanapun, adalah satu bentuk perundangan subsidiari. Sebagai perundangan subsidiari, peraturan-peraturan itu tidak berdiri di tempat yang seimbang dengan Akta induk dan tidak boleh mengatasi Akta induk.

(4) Frasa "tertakluk kepada subseksyen (2)" dalam s. 59(1) Akta tidak membuatkan s. 59(1) akur kepada s. 59(2), seperti yang dihujahkan. Ini adalah kerana s. 59(2) secara sendirinya tidak mengambil atau mengurangkan kuasa Majlis untuk menerima masuk "sesiapa yang mempunyai pengetahuan mencukupi berkenaan undang-undang Islam" sebagai Peguam Syarie. Seksyen 59(2) hanyalah satu peruntukan yang berkebolehan, di mana badan perundangan telah mengurniakan ke atas Majlis untuk menyediakan peraturan-peraturan supaya dapat mengawal selia tatacara dan kelayakan untuk kemasukan Peguam Syarie. Majlis tidak boleh, melalui perundangan subsidiari, membuat peraturan-peraturan yang tidak selaras atau bertentangan dengan s. 59(1). Kaedah 10, yang memperuntukkan bahawa seseorang boleh diterima masuk sebagai Peguam Syarie jika beliau beragama Islam, adalah dengan jelasnya bertentangan dengan s. 59(1) yang tidak menghadkan kuasa Majlis untuk menerima masuk hanya seseorang yang beragama Islam sebagai Peguam Syarie. Ia adalah *ultra vires* s. 59(1) Akta 1993.

(5) Pindaan pada s. 59(1) Akta oleh A931 tidak mengubah maksud perkataan "any person" dalam s. 59(1) atau mengurangkan kuasa Majlis untuk menerima masuk sesiapa yang mempunyai pengetahuan yang mencukupi berkenaan undang-undang Islam sebagai Peguam Syarie. Malah, pindaan meluaskan kuasa Majlis untuk menerima masuk Peguam Syarie.

Perkataan "persons" dalam s. 59(1) yang asal telah dipinda ke "any person" dalam s. 59(1) yang baru. Tambahan, sub-s. (3) telah diperkenalkan untuk meluaskan kuasa Majlis dengan membenarkan Majlis untuk mengecualikan mana-mana ahli Khidmat Guaman dan Kehakiman atau sesiapa sahaja yang dilantik di bawah s. 3 Akta Bantuan Guaman 1971 daripada peruntukan s. 59. Ini bermakna bahawa pandangan mahkamah ini berkenaan perkataan "any person" dalam s. 59(1) sebagai termasuk sesiapa sahaja tidak kira agama, adalah tidak bertentangan dengan keseluruhan skim Akta. Secara ringkas, Akta tidak akan menghalang sesiapa yang bukan beragama Islam yang mempunyai pengetahuan undang-undang Islam yang mencukupi untuk berbicara di Mahkamah Syariah.

(6) Perkataan "Muslim" tidak digunakan secara konsisten dalam Akta sebagai kelayakan berkenaan perkara-perkara berhubungan perlantikan, kemasukan dan keahlian badan, jawatankuasa atau majlis, atau perlantikan hakim-hakim Mahkamah Syariah. Walau bagaimanapun, jika niat s. 59 adalah untuk menerima masuk hanya orang Islam yang mempunyai pengetahuan yang mencukupi berkenaan undang-undang Islam sebagai Peguam Syarie, ia harus dinyatakan dengan jelas dan terang. Tanggungjawab mahkamah adalah untuk memperjelaskan bahasa Akta sejajar dengan peraturan-peraturan pentafsiran yang ditetapkan. Mahkamah tiada kena-mengena dengan dasar mana-mana Akta yang diseru untuk ditafsirkan.

Case(s) referred to:

Becke v. Smith [1936] 2 M&W 191 ***(refd)***

Capper v. Baldwin [1965] 2 QB 53 ***(refd)***

NKM Holding Sdn Bhd v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***

R v. Banbury (inhabitants) 1834 1 Ad & El 136 ***(refd)***

Legislation referred to:

Administration of Islamic Law (Federal Territories) Act 1993, ss. 10, 32, 41(2)(b)(ii), 42, 43(2)(b)(ii), 59(1), (2), (3)

Federal Constitution, arts. 5, 10(1)(c)

Interpretation Acts 1948 and 1967, ss. 2, 17A

Legal Aid Act 1971, s. 3

Peguam Syarie Rules 1993, rr. 3, 7, 10

Rules of the High Court 1980, O. 53

A *For the appellant - Ranjit Singh (Jamie Wong with him); M/s Ranjit Singh & Yeoh*

For the 1st respondent - Sulaiman Abdullah (Zulkifly Che Yong & Nur Elyani Noorkhuszairy with him); M/s Zulkifli Yong Azmi & Co

For the 2nd respondent - Arik Sanusi Yeop Johari (Norhisham Ismail with him); AG's Chambers

B

[Editor's note: For the High Court judgment, please see Victoria Jayaseele Martin v. Majlis Agama Islam Wilayah Persekutuan & Anor [2011] 7 CLJ 233.]

C *Reported by Wan Sharif Ahmad*

JUDGMENT

D **Abu Samah Nordin JCA:**

[1] This is an appeal by the appellant against the decision of the Kuala Lumpur High Court dismissing her application for judicial review pursuant to O. 53 of the Rules of the High Court 1980 for the following reliefs:

E

(a) A declaration that part of r. 10 of the Peguam Syarie Rules 1993 mandating that only Muslims can be admitted as 'Peguam Syarie' is *ultra vires* the Administration of Islamic Law (Federal Territories) Act 1993 ('the Act');

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(b) A declaration that part of r. 10 of the Peguam Syarie Rules 1993 mandating that only Muslims can be admitted as 'Peguam Syarie' is in contravention of art. 5 and/or art. 10(1)(c) of the Federal Constitution and is as a consequence void;

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(c) An order of *certiorari* to quash the decision of the respondent refusing to process the appellant's application to be admitted as 'Peguam Syarie'; and

H (d) An order of *mandamus* to compel the respondent to receive and process the appellant's application to be admitted as 'Peguam Syarie' without regard to the fact that the appellant is a non-Muslim.

I

[2] Leave to commence judicial review against the first respondent was granted by the High Court on 14 May 2010. However the learned High Court Judge who heard the substantive application for judicial review dismissed the appellant's application without costs on the ground that the Majlis Agama Islam Wilayah Persekutuan ('the Majlis') is empowered under s. 59(2) of the Act to make rules relating to qualification for admission of persons as Peguam Syarie, including the power to impose a condition that the applicant must be a Muslim. The opening words in s. 59(1) of the Act which begins with the phase "Subject to sub-s. (2)" means that the power of the Majlis to admit any person having sufficient knowledge of Islamic law must be subject to the rules made under s. 59(2) of the Act. The word 'qualification', in s. 59(2) of the Act is wide enough to empower the Majlis to impose a condition that a Peguam Syarie must be a Muslim. The learned judge at paras. 17 and 21 of her judgment said:

> 17. Whether or not the imposition of the requirement that a person must be a Muslim is within the power of Majlis must therefore depend on the meaning of the word qualification used in that section. If the legislature had intended that knowledge of Islamic Law *per se* is sufficient then s. 59(1) would have been enacted to read instead, "The Majlis shall admit any person having sufficient knowledge of Islamic Law ...". Since the opening words of s. 59(1) begin with "Subject to subsection (2)", it is clear that the qualification of a person with sufficient knowledge of Islamic Law in that s. 59(1) is subject to the power given to the Majlis in subsection (2). That being the case, I hold that the Majlis is empowered by virtue of s. 59(2) to regulate the qualification of a Peguam Syarie".
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> 21. "The power delegated to the Majlis is sufficiently wide to enable the Majlis to enact a condition that an applicant for admission as Peguam Syarie must be a Muslim, in addition to having sufficient knowledge of Islamic Law".

[3] Section 59 of the Act provides:

> (1) Subject to subsection (2), the Majlis may admit any person having sufficient knowledge of Islamic law to be Peguam Syarie to represent parties in any proceedings before the Syariah Court.
>
> (2) The Majlis may, with the approval of the Yang di Pertuan Agong, make rules:

A (a) To provide for the procedure, qualifications and fees for the admission of Peguam Syarie, and

(b) To regulate, control and supervise the conduct of Peguam Syarie.

B The Majlis, in exercise of its powers under s. 59(2) of the Act had in 1993 passed the rules known as Peguam Syarie Rules 1993.

[4] The appellant, a non-Muslim, applied to the Peguam Syarie C Committee, for admission as a Peguam Syarie. The Peguam Syarie Committee is established pursuant to r. 3 of the Peguam Syarie Rules 1993 ('the Rules'), whose functions are set out in r. 7, which includes, the power to conduct the examination of applicants for Peguam Syarie, to admit a person as a Peguam D Syarie and to issue the Peguam Syarie certificate.

[5] On 9 September 2009 the committee purportedly acting on behalf of the Majlis decided not to process the appellant's application on the sole ground that she is not a Muslim. The letter to the appellant dated 9 September 2009, signed by the E Chairman of the Committee states:

> Dukacita dimaklumkan bahawa pihak kami tidak dapat memproses permohonan pihak puan kerana mengikut Kaedah-Kaedah Peguam Syarie 1993 (P.U(A) 408/1993) syarat utama bagi seseorang F untuk memohon dan beramal sebagai Peguam Syarie di Wilayah Persekutuan adalah pemohon tersebut hendaklah seseorang yang berugama Islam.

[6] The condition that a Peguam Syarie must be a Muslim is found in r. 10 of the 1993 Rules which states:

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> 10. A person may be admitted to be a Peguam Syarie if he:
>
> (a) (i) is a Muslim and has passed the final examinations which leads to the certificate of a bachelor's degree in Syariah from any university or any Islamic educational institution H recognised by the Government of Malaysia; or
>
> (ii) is a Muslim member of the judicial and legal service of the Federation; or
>
> (iii) is a Muslim advocate and solicitor enrolled under the I Legal Profession Act 1976; or

(iv) has served as a Syariah Judge or as a Kathi with any State Government in Malaysia for a period of not less than seven years;

(b) has attained the age of twenty-one years;

(c) is of good behaviour and:

(i) has never been convicted in Malaysia or in any other place of any criminal offence;

(ii) has never been adjudged a bankrupt;

(d) is a Malaysian citizen; and

(e) as an advocate and solicitor, has passed the Sijil Peguam Syarie examination

[7] It is not in dispute that the appellant had not passed the examination for the certificate of Peguam Syarie nor being asked to sit for such examination. But the refusal to process the application was based solely on the ground that the appellant is not a Muslim and not on the ground that she had not passed the examination for the certificate of Peguam Syarie.

[8] The issue before us is whether that part of r. 10 which imposes a condition that only a Muslim can be admitted and be allowed to practice as a Peguam Syarie is *ultra vires* s. 59(1) of the Act. This is a matter of construction of s. 59(1) and s. 59(2) of the Act. It is not a question of whether a non-Muslim can, under Syariah law, be admitted as a Peguam Syarie. It is also not a question of whether the Syariah Court has jurisdiction over non-Muslims. It is simply a question of whether that condition in r. 10 is *ultra vires* s. 59(1) of the Act. The consequential reliefs in the form of *certiorari* to quash the decision of the first respondent in refusing to process her application and *mandamus* to compel the first respondent to process her application would only be relevant if the appellant is successful in her application for the declarations.

[9] It must be stressed here that this is not an application to compel the first respondent to admit the appellant as a Peguam Syarie solely on the basis of her application. She had not sat nor passed the Sijil Peguam Syarie examination, a fact which is conceded by learned counsel for the appellant. An applicant will not be admitted as a Peguam Syarie if he or she had not passed the Sijil Syarie examination (see r. 10(e)).

[10] Learned counsel for the appellant contended that the condition in r. 10 that only a Muslim may be admitted as a Peguam Syarie is *ultra vires* s. 59(1) as that section allows any person with sufficient knowledge of Islamic law to be admitted as a Peguam Syarie. A person's faith or religion is not a *sine qua non* for admission as a Peguam Syarie under s. 59(1) of the Act.

[11] Dato' Hj Sulaiman bin Abdullah, learned counsel for the first respondent contended that the legislature, in its wisdom, had delegated the power to the Majlis to make rules regarding the qualification of a person for admission as a Peguam Syarie as the Majlis is the proper body entrusted under the Act to advise the Yang di-Pertuan Agong on matters relating to the religion of Islam. (Section 4(1) of the Act). The words, "subject to sub-s. (2)" in s. 59(1) of the Act means that the power of the Majlis to admit a person as a Peguam Syarie is subject to the rules made under s. 59(2). Such power must be exercised in accordance with r. 10 of the Peguam Syarie Rules 1993. It is a basic requirement that a Peguam Syarie must be a Muslim as the Syariah Court has no jurisdiction over non-Muslims. For instance, the Syariah Court may be confronted with a jurisdictional issue if a Peguam Syarie, being a non-Muslim, commits contempt of court. Therefore the court must look at the Act as a whole and adopt a purposive approach in the interpretation of s. 59, consistent with s. 17A of the Interpretation Acts 1948 and 1967.

[12] Learned Senior Federal Counsel, Dr Arik Sanusi, for the second respondent pointed out that the words, "subject to sub-s. (2)" were introduced into the current s. 59(1) of the Act by Act A931 in 1995. The original s. 59(1) did not contain the words "subject to sub-s. (2)". The intention of the amendment was to make it clear that the power of the Majlis to admit a Peguam Syarie must be exercised in accordance with the rules made under s. 59(2) including the qualification that the applicant must be a Muslim.

[13] The original s. 59 prior to its amendment reads:

> 59. (1) The Majlis may, on payment of the prescribed fee, admit persons having sufficient knowledge of Islamic Law to be Peguam Syarie to represent parties in any proceedings before any Syariah Court.
>
> (2) The Majlis may, with approval of the Yang di-Pertuan Agong, make rules:

(a) to provide for the procedure, qualifications and fees for the admission of Peguam Syarie; and

(b) to regulate, control, and supervise the conduct of Peguam Syarie.

(3) Notwithstanding anything contained in any other written law, no person other than a Peguam Syarie shall be entitled to appear in any Syariah Court on behalf of any party to any proceedings before it.

[14] We had examined the Act in its entirety. In our view s. 59(1) expressly allows the Majlis to admit any person having sufficient knowledge of Islamic law to be a Peguam Syarie. Section 59(1) in its present form does not delimit the power of the Majlis to admit a person as a Peguam Syarie only to Muslims. In the absence of any definition, the words "any person" in s. 59(1) in their natural meaning must mean any person, regardless of his or her religion. There is nothing in the Act to restrict the meaning of the words "any person" to mean "any Muslim". Thus, any person, with sufficient knowledge of Islamic law may under s. 59(1) be admitted as a Peguam Syarie at the discretion of the Majlis. Even being a Muslim *per se*, it is not sufficient to be admitted as a Peguam Syarie. He must be a Muslim with sufficient knowledge of Islamic law. It is not the function of the court to question why s. 59(1) was drafted as such? It is naive to assume that any non-Muslim is incapable of acquiring sufficient knowledge of Islamic law. It is common knowledge that Islamic law, as a subject of learning is not the monopoly of Muslims.

There is no prohibition for non-Muslims to acquire knowledge of Islamic law.

[15] Subsection 2 of s. 59 of the Act is an enabling provision, which empowers the Majlis, with the approval of the Yang di-Pertuan Agong, to make rules:

(a) to provide for the procedure, qualifications and fees for admission of Peguam Syarie, and

(b) to regulate, control and supervise the conduct of Peguam Syarie.

By definition, the Rules made under s. 59(2) are a form of subsidiary legislation (see s. 2 of the Interpretation Acts 1948 and 1967). They do not stand on equal footing as the parent Act and cannot override the parent Act. The power of the Majlis to admit any person having sufficient knowledge of Islamic law as a Peguam Syarie is conferred by the parent Act itself.

[16] The phrase "subject to sub-s. (2)" in s. 59(1) of the Act does not make s. 59(1) subservient to s. 59(2), as contended by the respondents. This is because s. 59(2) itself does not take away or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a Peguam Syarie. Section 59(2) is merely an enabling provision, which the legislature has conferred on the Majlis to make rules, with the approval of the Yang di-Pertuan Agong, regulating the procedure and qualification for admission of Peguam Syarie. The Majlis cannot by way of a subsidiary legislation, make rules inconsistent with or contrary to s. 59(1). In our view r. 10 of the Peguam Syarie Rules 1993, which provides that a person may be admitted as a Peguam Syarie if he is a Muslim is clearly contrary to s. 59(1) which does not limit the power of the Majlis to admit a person as a Peguam Syarie to Muslims only. It is *ultra vires* s. 59(1) of the Act.

[17] In our view the amendment to s. 59(1) by Act A931 did not alter the meaning of the words "any person" in s. 59(1) or curtail the power of the Majlis to admit any person having sufficient knowledge of Islamic law as a Peguam Syarie. The explanatory statement to cl. 4 of the Bill relating to Administration of Islamic Law (Federal Territories) (Amendment) Act 1995 states,

> 4. Clause 4 seeks to substitute section 59 of the Act with a new section 59 to enable the Majlis to admit Peguam Syarie to represent parties in proceedings before the Syariah Courts and to exempt certain persons from the provisions relating to admission of Peguam Syarie in the Syariah Courts.

The explanatory statement is not of much help. The first part of it is superfluous, as the Majlis had already been given the power to admit Peguam Syarie under the old s. 59(1).

[18] The explanatory statement also makes no reference to a person's faith. The amendment in fact widens the power of the Majlis to admit a Peguam Syarie. The word "persons" in the original s. 59(1) had been amended to "any person", in the new

s. 59(1). The old sub-s. (3) of s. 59 had been amended and renumbered as sub-s. 4 and a new sub-s. (3) was introduced. This new sub-s. 3 widens the power of the Majlis by allowing it to exempt any member of the Judicial and Legal Service or any person appointed under s. 3 of the Legal Aid Act 1971 from the provisions of s. 59. There was no such provision under the old s. 59. Thus, any such person may now appear in the Syariah Court on behalf of any party, upon being granted the exemption by the Majlis.

[19] Our view that the words "any person" in s. 59(1) include any person regardless of his religion is not contrary to the whole scheme of the Act. The Act does not close the doors for non-Muslims having sufficient knowledge of Islamic law to appear in Syariah Court. Section 59(3) gives the Majlis the discretion to exempt:

(i) any member of the Judicial and Legal Service; or

(ii) any person appointed under s. 3 of the Legal Aid Act 1971;

from the provision of s. 59 itself. This means that any member of the Judicial and Legal Service or any person appointed under s. 3 of the Legal Aid Act 1971 may appear in Syariah Court if granted the exemption.

[20] It is a known fact that there are non-Muslims members in the Judicial and Legal Service. Similarly, a person appointed under s. 3 of the Legal Aid Act 1971 need not be a Muslim. These two categories of persons need not have to be a Peguam Syarie in order to appear in the Syariah Court. The only restriction is that they have to obtain the necessary exemption from the Majlis.

[21] We note that the word 'Muslim' has not been used consistently throughout the Act as a qualification on matters relating to appointment, admission of or membership of a body, committee, council or appointment of judges of the Syariah Court. For instance, members of the Majlis (s. 10) and members of the Syariah Appeal Court (s. 42) must be Muslims. The word Muslim is conspicuously absent in s. 41(2)(b)(ii) and s. 43(2)(b)(ii). A person who is a citizen and learned Islamic Law may be appointed as a Chief Syariah Judge under s. 41(2)(b)(ii). A person who is a citizen and learned Islamic law may be appointed as a

judge of the Syariah High Court under s. 43(2)(b)(ii). Section 59(1) does not use the word "Muslim" but uses the words "any person". Section 32, which provides for the appointment of Mufti and Deputy Mufti does not use the word "Muslim" but uses the words "fit and proper persons". That was the way the Act was drafted and passed by the Legislature. Why did the legislature use the words "any person" instead of the words "any Muslim" or words to that effect in s. 59(1) of the Act if the intention and purpose of s. 59 is to admit only Muslims having sufficient knowledge of Islamic law as a Peguam Syarie? If that was the intention and purpose of the Act, it must say so in clear and unequivocal terms.

[22] The rule of construction is "to intend the legislature to have meant what they have actually expressed "(*R v. Banbury (inhabitants)* 1834 1 Ad & El 136, per Lord Parker at p. 142) and that "the intention of Parliament must be deduced from the language used" (*Capper v. Baldwin* [1965] 2 QB 53 at p. 61. The Supreme Court (as it then was) in *NKM Holding Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39 reminded the judges that they are not legislators. The duty of the court is to expound the language of the Act in accordance with the settled rules of construction. The court has nothing to do with the policy of any Act, which it may be called upon to interpret. That may be a matter for private judgment. The onus of showing that the words do not mean what they say lies heavily on the party who alleges it. He must, as Parke B stressed in *Becke v. Smith* [1936] 2 M&W 191, 195, advance something which clearly shows that the grammatical construction would be repugnant to the intention of the Act or lead to some manifest absurdity. The respondents had not convinced us that it was the clear intention of the Act to admit only Muslims with sufficient knowledge of Islamic law as a Peguam Syarie.

[23] For the aforesaid reasons, we allow the appeal by the appellant, set aside the orders of the learned judge and grant the declaration sought as in para. 1.1 and the consequential orders as in paras. 1.3 and 1.4 of the appellant's application. In view of the abovesaid decision, it would not be necessary for us to decide whether r. 10 is unconstitutional or *ultra vires* art. 5 and/or art. 10(1) of the Federal Constitution.

[24] By consent we made no order as to costs.